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SUPREME COURT, U.S

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. ~~1948.~~ 1948

No. ~~486~~ 17

ALEXANDER BOYD,
Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT.

REPLY BRIEF ON BEHALF OF PETITIONER.

MELVIN L. GRIFFITH,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois.

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

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I.

THE QUESTION HERE RESTS UPON EXISTING FACTS AND EXISTING RIGHTS AND IS NOT MOOT.

The question to be decided by this Court involves the freedom of an injured railroadman to select the forum in which to bring his suit and to have the issues tried in that forum. As was said in *Peterson* v. *Ogden Union Railway and Depot Co.*, 175 Pac. (2d) 744, cited in our brief in support of the Petition for Certiorari, p. 251.26:

> "The spirit and the letter of the Act require that an injured employee be left free and uninfluenced by

the carrier in selecting the Court in which to bring his action."

Plaintiff selected the Superior Court of Cook County in which to bring his suit. That suit is still pending. The right to select that forum and to have his case heard there still exists. The controversy growing out of the contracts in which respondent claims he parted with this right, still exists.

The Supreme Court of Michigan decided that controversy against Petitioner. The controversy is now in this Court for the purpose of determining the validity or invalidity of the contracts which are said to limit his freedom of choice of a forum in which to bring his suit. If they are invalid he still has that freedom of choice. If they are valid he is required to choose his forum from the field as limited by those contracts.

As a precaution against the possibility that he may be required by a final decision of this Court to bring his suit in a forum prescribed by the contracts, he filed another suit in the United States District Court sitting at Detroit, Michigan. Two years of the three year period of limitation provided by the venue section of the statute were gone. To protect his right to file suit anywhere in the event this Court should affirm the judgment of the Supreme Court of Michigan and further, in that event, to get his case heard with as little additional delay as possible, he filed this second suit. (See Affidavit, Appendix.)

This second suit was filed at a place where he could have filed it in the first instance under the Act, apart from any requirement of the contract, had he deemed it to his advantage to do so. The fact that he selected the Cook County, Illinois forum in the first instance, in the circumstances of this case, constitutes a strong indication that the second forum was not freely chosen. That selection was compelled

by the fear that the contracts might finally be held valid by this Court. His freedom of choice was, therefore, still affected by the contracts even though this Court may hold they are invalid.

The assertion of Respondent that the second suit was filed in compliance with the contracts and in obedience to the injunctional order are mere conclusions of Respondent's counsel and are not based upon any fact in the record.

The suit in Chicago which furnished the reason for the controversy was freely brought in spite of the contracts and has not been dismissed. The facts upon which this Court is petitioned to act are not changed, so the question presented to this Court on those facts involve the merits of plaintiff's claim to the rights created by the Act.

Moreover, other questions remain for decision. The serious divergence of opinion of Federal and State Courts is to be corrected; the controlling quality of decisions of Federal Courts of review in Employers Liability Act cases is to be vindicated and the fact, as held in *Akerly* v. *New York Central Railroad Company*, 168 F. (2d) 812, 815, that though we deal here with private rights those rights are "affected with a public interest" is to be considered.

> *Cramer* v. *Phoenix Mutual Life Ins. Co. of Hartford, Conn.*, 91 F. (2d) 141, 144.

The question is therefore not moot and the case may not be dismissed.

II.

THERE IS A FEDERAL QUESTION.

Respondent admits that this Court has jurisdiction to hear this case, but denies there is any Federal question to be decided.

We rely upon what we say in the Petition and Supporting Brief on these subjects.

Respectfully submitted,

MELVIN L. GRIFFITH,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
FRANCIS H. MONEK,
Chicago, Illinois,

JOHN L. MECHEM,
Battle Creek, Michigan,
Of Counsel.

APPENDIX.

STATE OF ILLINOIS,
COUNTY OF COOK. } ss

MELVIN L. GRIFFITH, being first duly sworn, on oath says:

1. He is one of the attorneys for Petitioner in the above cause and represents Petitioner in the proceedings in this Court.

2. The case of *Alexander Boyd* v. *Grand Trunk Western Railroad Company*, a corporation, in the Superior Court of Cook County, Illinois, No. 47S10416 is still pending and will proceed to trial in said Court in the event that the judgment of the Michigan Court is reversed by this Court. (See clerk's certificate to complaint, Appendix, Page 34, Petition for Certiorari in this Court).

3. The case of *Alexander Boyd* v. *Grand Trunk Western Railroad Company*, a corporation, in the United States District Court, Eastern District of Michigan, Southern Division, No. 7718, was filed as a precaution to protect Petitioner's cause of action against the running of the Statute of Limitations in the event that this Court should affirm the judgment of the Michigan Court. The suit was filed on October 27, 1948, instead of delaying the filing of such a protective suit until this Court could pass upon the question, for the reason that in the event this Court should affirm the judgment of the Michigan Supreme Court, the case would be in a favorable position on the District Court's Calendar to be reached for an early trial, whereas if the filing of such protective suit were delayed until some later date, nearer to the time when the Statute would run, trial of the case would be greatly delayed.

4. When affiant served copies of the Record, Petition and Supporting Brief, together with Notice of filing the same in this Court, upon George F. Gronewold, Counsel for

Respondent in this cause, on or about the 3rd day of January, 1949, affiant informed Mr. Gronewold that the suit in the United States District Court, Eastern District of Michigan, had been or would be filed for the reasons stated in Paragraph 3.

5. Affiant further says that the sole reason for filing suit in Michigan was for the purpose above stated; that the suit was not filed in compliance with the contracts involved in these proceedings or with the restraining order of the Michigan Court; that the rights asserted here by Petitioner to file and maintain his suit in the Superior Court of Cook County and for which he seeks vindication in this Court, have not in any way been settled, compromised, surrendered or impaired, unless it is, that the diligence of his counsel in protecting his cause of action pending this Court's decision in the case be held to have that effect.

Further affiant sayeth not.

MELVIN L. GRIFFITH.

Subscribed and sworn to before me this 28th day of January, A. D. 1949.

[SEAL]

MARTIN J. KENNELLY,
Notary Public.